

2010 WL 6839608 (Cal.Superior) (Trial Motion, Memorandum and Affidavit)
Superior Court of California.
Los Angeles County

Erika RICHARDSON,
v.
CENTINELA HOSPITAL, et al.

No. BC419576.
April 26, 2010.

(Notice of Motion and Motion to Strike Portions of Plaintiffs' First Amended Complaint and Request for Judicial Notice Served and Filed Concurrently Herewith)

Date: June 1, 2010

Time: 8:30 a.m.

Complaint Filed: 8/11/09

Trial Date: Not Set

**Notice of Demurrer and Demurrer by Defendant Prime Healthcare Centinela LLC dba
Centinela Hospital Medical Center; Memorandum of Points and Authorities in Support Thereof**

Michael J. Trotter (State Bar No. 139034), [Brenda Ligorsky](#) (State Bar No. 169707), Carroll, Kelly, Trotter, Franzen & McKenna, Post Office Box 22636, 111 West Ocean Boulevard, 14th Floor, Long Beach, California 90801-5636, (562) 432-5855 (562) 432-8785 Facsimile, Attorneys for Defendant Prime Healthcare Centinela LLC dba Centinela Hospital Medical Center (erroneously named served herein as Centinela Hospital, owned and operated by Prime Healthcare Services, Inc, a Corporation).

Judge [Cary H. Nishimoto](#) Department E.

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TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN.

PLEASE TAKE NOTICE that on June 1, 2010 at 8:30 a.m., or as soon thereafter as counsel may be heard in Department E of the above-entitled Court located at 825 Maple Avenue, Torrance, California, defendant Prime Healthcare Centinela LLC dba Centinela Hospital Medical Center will demur to plaintiffs' First Amended Complaint.

This demurrer is brought on the grounds that the first cause of action for elder/dependent adult abuse, the second cause of action for intentional infliction of emotional distress, the fourth cause of action for defamation, the fifth cause of action for negligent infliction of emotional distress, the sixth cause of action for intentional infliction of emotional distress, the seventh

cause of action for willful misconduct, and the eighth cause of action for fraud fail to state facts sufficient to constitute a cause of action against this demurring defendant, pursuant to *Code of Civil Procedure*, section 430.10(e).

In addition, defendant hereby demurs to all of the causes of action in plaintiffs' First Amended Complaint pursuant to *Code of Civil Procedure*, section 430.10(f), and pursuant to the doctrine of judicial estoppel, on the grounds that they are inherently contradictory, thus rendering them sufficiently vague, ambiguous and uncertain such as to render it a sham pleading.

Further, defendant demurs to plaintiffs' First Amended Complaint on the grounds that the first, second, fourth, fifth, sixth, seventh and eighth causes of action are duplicative of the third cause of action for negligence. Therefore, these causes of action fail to state a cause of action, pursuant to *Code of Civil Procedure*, section 430.10(e).

Lastly, this demurrer is brought pursuant to *Code of Civil Procedure*, section 430.10(e), as plaintiff Jacqueline Kirby's fourth cause of action for defamation is time-barred, pursuant to *Code of Civil Procedure*, section 340.

This Demurrer is based upon this Notice, the attached Demurrer and Memorandum of Points and Authorities, upon all papers and pleadings on file herein, and upon such other oral and/or further material and argument as may be presented at the hearing on the demurrer.

DATED: April 22, 2010

CARROLL, KELLY, TROTTER, FRANZEN & McKENNA

MICHAEL J. TROTTER

BRENDA LIGORSKY

Attorneys for Defendant PRIME HEALTHCARE CENTINELA LLC dba CENTINELA HOSPITAL MEDICAL CENTER

DEMURRER TO FIRST AMENDED COMPLAINT

Defendant Prime Healthcare Centinela LLC dba Centinela Hospital Medical Center hereby emurs to plaintiffs' First Amended Complaint as follows:

FIRST CAUSE OF ACTION

(Elder/Dependent Adult Abuse)

1. The first cause of action fails to state facts sufficient to constitute a cause of action against demurring defendants. [*Code Civ. Proc.*, § 430.10(e).]
2. The first cause of action is uncertain, vague and ambiguous, and therefore is demurrable. [*Code of Civ. Proc.*, §430.10(f)]

SECOND CAUSE OF ACTION

(Intentional Infliction of Emotional Distress)

3. The second cause of action fails to state facts sufficient to constitute a cause of action against demurring defendants. [*Code Civ. Proc.*, § 430.10(e).]

4. The third cause of action is uncertain, vague and ambiguous, and therefore is demurrable. [[Code of Civ. Proc., §430.10\(f\).](#)]

THIRD CAUSE OF ACTION

(Negligence)

5. The third cause of action is uncertain, vague and ambiguous, and therefore is demurrable. [[Code of Civ. Proc., §430.10\(f\).](#)]

FOURTH CAUSE OF ACTION

(Defamation)

6. The fourth cause of action fails to state facts sufficient to constitute a cause of action against demurring defendants. [[Code Civ. Proc., § 430.10\(e\).](#)]

7. The fourth cause of action is uncertain, vague and ambiguous, and therefore is demurrable. [[Code of Civ. Proc., §430.10\(f\).](#)]

8. The fourth cause of action is time-barred. [[Code of Civ. Proc., § 340.](#)]

FIFTH CAUSE OF ACTION

(Negligent Infliction of Emotional Distress)

9. The fifth cause of action fails to state facts sufficient to constitute a cause of action against demurring defendants. [[Code Civ. Proc., § 430.10\(e\).](#)]

10. The fifth cause of action is uncertain, vague and ambiguous, and therefore is demurrable. [[Code of Civ. Proc., §430.10\(f\).](#)]

SIXTH CAUSE OF ACTION

(Intentional Infliction of Emotional Distress)

11. The sixth cause of action fails to state facts sufficient to constitute a cause of action against demurring defendants. [[Code Civ. Proc., § 430.10\(e\).](#)]

12. The sixth cause of action is uncertain, vague and ambiguous, and therefore is demurrable. [[Code of Civ. Proc. §430.10\(f\).](#)]

SEVENTH CAUSE OF ACTION

(Willful Misconduct)

13. The seventh cause of action fails to state facts sufficient to constitute a cause of action against demurring defendants. [[Code Civ. Proc. § 430.10\(e\).](#)]

14. The seventh cause of action is uncertain, vague and ambiguous, and therefore is demurrable.

EIGHTH CAUSE OF ACTION

(Fraud)

15. The eighth cause of action fails to state facts sufficient to constitute a cause of action against demurring defendants. [*Code Civ. Proc.*, § 430.10(e).]

16. The eighth cause of action is uncertain, vague and ambiguous, and therefore is demurrable.

WHEREFORE, defendant prays for judgment as follows:

1. That defendant's demurrer to plaintiffs' First Amended Complaint be sustained without leave to amend;
2. That defendant have judgment in its favor; and
3. That defendant be awarded its costs of suit and such other and further relief as the Court deems just and proper.

DATED: April 22, 2010

CARROLL, KELLY, TROTTER, FRANZEN & McKENNA

MICHAEL J. TROTTER

BRENDA LIGORSKY

Attorneys for Defendant PRIME HEALTHCARE CENTINELA LLC dba CENTINELA HOSPITAL MEDICAL CENTER

MEMORANDUM OF POINTS & AUTHORITIES

SUMMARY OF ARGUMENT

This is an action by plaintiff Jacqueline Kirby, both individually and as the Guardian ad Litem for her daughter, Erika Richardson against various defendants, including Prime Healthcare Centinela LLC dba Centinela Hospital Medical Center (hereinafter "Centinela Hospital"), in which plaintiffs allege an array of negligent and intentional tort claims, including dependent adult **abuse**, intentional and negligent infliction of emotional distress, willful misconduct, and fraud. (FAC, Caption.)

As a preliminary matter, it should be noted that the causes of action for willful misconduct and fraud were not contained in the original Complaint, and were added to the First Amended Complaint without leave of the Court. Therefore these causes of action should be stricken.

All of plaintiffs' causes of action arise from Erika Richardson's hospitalization at Centinela Hospital from *February 21, 2008* through *April 14, 2008* (FAC, ¶¶ 17-31.) Plaintiffs contend that medical negligence and dependent adult **abuse** was committed on plaintiff Erika Richardson, including her alleged premature discharge from the hospital, and her development of a **bedsore**. (FAC, ¶¶ 17-313.) Plaintiffs further allege that defendants defamed Ms. Kirby by reporting her to the state for suspected **abuse**, which resulted in her losing her daughter for some time to Adult Protective Services. (FAC, ¶¶ 48-52.)

Unfortunately for plaintiffs, the documentation filed by both the Regional Center, and by **their own counsel** in the conservatorship proceeding contradicts the allegations in the First Amended Complaint regarding both the reasons Ms. Richardson was removed from her mother's home, **and whether the bedsore was present prior to Ms. Richardson's**

admission to Centinela Hospital. (See Exhibits A, B, C and D to Request for Judicial Notice.) Plaintiffs are precluded from arguing the contrary, pursuant to the doctrine of judicial estoppel. Moreover, these inherent contradictions make the First Amended Complaint sufficiently vague, ambiguous and uncertain, to render it a sham pleading.

Even after being granted leave to amend, plaintiffs' allegations are insufficient to support their intended causes of action for Ms. Richardson, other than for medical negligence. These other claims arise from the identical allegations to those in plaintiffs' cause of action for negligence – that Ms. Richardson's health care providers were negligent in their care and treatment of her. Therefore, it is simply medical negligence masquerading as a variety of other torts in a misguided attempt to expand the damages available to plaintiffs.

Moreover, Ms. Kirby's causes of action are inappropriate, as they are being advanced against a defendant who is immune from liability related to reporting of suspected **abuse**. Her defamation claim is also untimely. Because plaintiffs have been unable to adequately plead a valid cause of action, defendant's demurrer should be sustained in its entirety without leave to amend.

I. PLAINTIFFS' FIRST AMENDED COMPLAINT IS A SHAM PLEADING (CODE OF CIV. PROC., §430.10(f))

Code of Civil Procedure, section 430.10(f) permits a demurrer to be sustained on the grounds that a complaint is vague, ambiguous and uncertain. Moreover, a complaint, such as the First Amended Complaint before this Court, which contains hopelessly inconsistent pleadings and allegations, may be properly disregarded as a sham. (*Amid v. Hawthorne Community Medical Group, Inc.* (1989) 212 Cal.App.3d 1383, 1390-1391 [plaintiff alleged breach of oral contract but failed to allege any express oral terms until the Fourth Amended Complaint, and failed to explain this inconsistency in the pleadings. Dismissal following demurrer affirmed on grounds of sham pleadings].)

The First Amended Complaint alleges that Centinela Hospital "falsely" claimed that Ms. Richardson was admitted with a **bedsore**, filed a "false claim" with Adult Protective Services regarding the same, and then "altered the medical records" to support this conduct. (FAC, ¶¶ 48-51.) The First Amended Complaint further alleges that as a result of these acts, the Regional Center removed Ms. Richardson from her mother's home. (FAC, ¶ 52.) This is not true.

The petition filed by the Regional Center, a copy of which is attached to the Request for Judicial Notice as Exhibit A, **does not mention a report by Centinela Hospital as the basis for the petition**. In fact, the **bedsore** was only one reason for the plaintiff being removed from her mother's care. The petition was based on problems observed by the Regional Center during the month after plaintiff left the Hospital. These issues included the **bedsore** being contaminated with feces at the mother's home, plaintiff being left alone there, and the lack of cleanliness in the home. (See Exhibits A, B and C to Request for Judicial Notice.) **In fact, the Regional Center specifically alleged in its pleadings that the bedsore was not the only reason for the conservatorship proceeding.** (See Exhibit C to Request for Judicial Notice.)

Lisa Fisher, counsel for plaintiffs in this case, also represented Jacqueline Kirby in the conservatorship proceeding. **Shockingly, in pleadings filed with the Court in the conservatorship proceeding, Ms. Fisher admits that the bedsore was present prior to the plaintiff's admission to Centinela Hospital on February 21, 2008. This document was verified under penalty of perjury by Jacqueline Kirby.** (See Exhibit D to Request for Judicial Notice.) Specifically, this pleading states that on *February 19, 2008*, Ms. Kirby brought her daughter for a physical with Rachna Gupta, M.D., who showed her an area of discoloration on Ms. Richardson's tailbone. She then states "The medical records from Centinela indicated that the minor 'discoloration' that Ms. Kirby brought to Dr. Gupta's attention was in fact a minor Stage II decubitus." (See Exhibit D to Request for Judicial Notice.)

Judicial estoppel "'is an equitable doctrine aimed at preventing fraud on the courts.' '[T]he essential function and justification of judicial estoppel is to prevent the use of intentional self-contradiction as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.' 'The primary purpose of the doctrine is not to protect litigants, but to protect the integrity of the judiciary.'" (*Thomas v. Gordon*, (2000) 85 Cal.App.4th 113, 118, citations omitted.)

Courts have held that judicial estoppel generally applies when “(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position; (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud or mistake.” (*Drain v. Betz Laboratories*, (1999) 69 Cal.App.4th 950, 957.)

In this case, the same party, i.e., Jacqueline Kirby and her counsel have asserted two different positions in two separate judicial proceedings. Ms. Kirby successfully regained the care of her daughter (FAC, ¶ 52.) It is totally inconsistent for Ms. Kirby to argue in one proceeding that the **bedsore** occurred under her care, and to argue in the instant case that not only did it occur at the Hospital, but that the Hospital fraudulently claimed otherwise. This cannot be the result of ignorance, fraud or mistake, as the claims in the first case were verified, with documents submitted to support them. Therefore, the doctrine of judicial estoppel renders this a sham pleading, and Centinela Hospital's demurrer should be sustained in its entirety without leave to amend.

II. THE FIRST AMENDED COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR DEPENDENT ADULT ABUSE

A. PLAINTIFFS HAVE FAILED TO MEET THE PLEADING REQUIREMENTS OF WELFARE AND INSTITUTIONS CODE, SECTION 15657

In its demurrer to the first Complaint, Centinela Hospital argued that plaintiffs had failed to meet the pleading requirements of *Welfare and Institutions Code, section 15657*, as the facts plead were insufficient to rise to the level of recklessness, oppression, fraud or malice, as they were simply conclusory. Defendant also argued that ratification was not adequately alleged. The Court agreed. (See Exhibit E to Request for Judicial Notice.) Plaintiffs' First Amended Complaint has failed to correct these pleading defects, as they have simply added additional conclusory allegations, without additional **facts** to support them. Therefore, the demurrer must be sustained as to this cause of action, this time without leave to amend.

In order to state a cause of action for dependent adult **abuse** pursuant to *Welfare and Institutions Code, section 15657*, plaintiffs must plead facts sufficient to show: (1) that the defendant committed physical **abuse**, neglect, or fiduciary **abuse**; (2) that the alleged **abuse** was committed with recklessness, **oppression, fraud or malice**; and (3) that the defendant entity ratified the alleged intentional conduct of its employees. In this case, plaintiffs' first cause of action is defective, because they have failed to adequately plead that defendant was reckless, oppressive, fraudulent or malicious in the commission of the alleged **abuse**, as *section 15657* requires, or that any of these entities ratified the alleged **abuse**.

In addition, those facts must be alleged with sufficient particularity conduct which would support the recovery of punitive damages. (*Welf. & Inst. Code, § 15657(c)*.) Plaintiffs must plead facts sufficient to show **by clear and convincing evidence** that defendant acted with oppression, fraud or malice pursuant to *Civil Code, section 3294*. (*Welf. & Inst. Code, § 15657(c); Delaney v. Baker* (1999) 20 Cal.4th 23, 35.) “In order to obtain the Act's heightened remedies, a plaintiff must allege conduct essentially equivalent to conduct that would support recovery of punitive damages...” (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 789.) **Those facts may not be alleged by incorporating the other allegations in the Complaint by reference, as plaintiffs have done here. They must be specifically plead as part of the dependent adult abuse cause of action.** (*Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 530.)

Dependent adult **abuse** requires the pleading of **egregious** acts of **abuse**, and **extreme cases** of **abuse**, something more than “inadvertence, incompetence, unskillfulness, or a failure to take precautions” but “a conscious choice of a course of action...” (*Benun v. Superior Court* (2004) 123 Cal.App.4th 113, 123.) Moreover, recklessness is “a subjective state of culpability greater than simple negligence.” (*Delaney v. Baker, supra*, 20 Cal.4th 31-32.) The *Benun* Court calls recklessness “extreme” behavior, even more than gross negligence. (*Benun v. Superior Court, supra*, 123 Cal.App.4th at 123.) That is simply not plead in this First Amended Complaint.

In pleading those facts sufficient to establish dependent adult abuse, plaintiffs must identify and allege specific facts and not mere conclusions. (*Roth v. Shell Oil Co.* (1960) 185 Cal.App.2d 676, disapproved on other grounds by *Templeton Feed & Grain v. Ralston Purina Co.* (1968) 69 Cal.2d 461, 471.) “Notwithstanding relaxed pleading criteria, certain tortious injuries to demand firm allegations....When nondeliberate injury is charged, allegations that the defendant's conduct was wrongful, willful, wanton, reckless or unlawful do not support a claim for exemplary damages; such allegations do not charge malice. [Citations omitted.] When a defendant must produce evidence in defense of an exemplary damage claim; fairness demands that he receive adequate notice of the kind of conduct charged against him.” (*G.D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.3d 22, 29.)

Thus, a plaintiff seeking to advance a claim for dependent adult abuse pursuant to section 15657, must specifically plead ultimate facts that would support such an allegation. This requirement is not satisfied by vaguely and generally alleging mere conclusions of law as plaintiffs here have done. The first cause of action vaguely and generally alleges that defendant's conduct was done with recklessness, oppression, fraud or malice. (FAC, ¶ 75.) Thus, plaintiffs' cursory allegations fail to meet the pleading requirements of *Welfare and Institutions Code*, section 15657.

In *Blegen v. Superior Court* (1981) 125 Cal.App.3d 959, the court stated that conclusory language, such as the statutory description of conduct entitling a plaintiff to punitive damages, may not be pleaded as a substitute for specific facts apprising a defendant of the basis upon which relief is sought. Mere conclusory allegations of malice, oppression, fraud, intent to injure or disregard of plaintiff's rights are insufficient to state a claim pursuant to *Civil Code*, section 3294, and by extension, pursuant to *Welfare and Institutions Code*, section 15657. (See *Cooper v. National Railroad Passenger Corp.* (1975) 45 Cal.App.3d 389.) A claim for punitive damages cannot be plead generally; specific factual allegations are required. (*Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864.) Since the facts, as opposed to legal conclusions alleged by plaintiffs, are simply missing from the first cause of action, the demurrer to this cause of action must be sustained without leave to amend.

Plaintiffs have now attempted to allege that Centinela Hospital ratified its agents or employees' alleged intentional conduct, but the allegations are inadequate. (FAC, ¶ 76.) In *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 723, the Court held that punitive damages may be plead against an employer, based on the actions of an employee only where “such conduct must have been performed by an ‘agent... employed in a managerial capacity and... acting in the scope of employment,’ or ratified or approved by a ‘managerial agent’ of the organization.” (*Ibid.*, citations omitted.)

Here, plaintiffs have failed to meet the requirements set forth by the Court in *College Hospital*, as they have failed to specifically allege that any employee in a managerial capacity and acting in the scope of employment, or “managerial agent” of the organization committed the alleged abuse. Therefore, it is clear that plaintiffs have failed to adequately allege ratification, and defendant's demurrer to this cause of action must be sustained without leave to amend.

B. DEPENDENT ADULT ABUSE DAMAGES ARE NOT AVAILABLE AGAINST A HEALTH CARE PROVIDER WHERE THE CAUSE OF ACTION IS BASED ON THE PROVIDER'S ALLEGED PROFESSIONAL NEGLIGENCE

Plaintiffs are attempting to invoke California's Elder and Dependent Adult Civil Protection Act (*Welf. & Inst. Code*, § 15600, *et seq.*) in an attempt to recover attorneys' fees in an action for medical negligence. However, both by statute and by recent case law, they are not permitted to do so. Therefore, the demurrer to this misplaced cause of action must be sustained without leave to amend.

In 1991 the Legislature amended the Elder And Dependent Adult Civil Protection Act (hereinafter “EADACPA”) to include enhanced remedies not available to plaintiffs in ordinary personal injury and wrongful death actions. (*Welf. & Inst. Code*, § 15600(h).) However, the Legislature specifically noted that such remedies were not available against health care providers in professional negligence actions.¹ / The Legislature expressly excluded from EADACPA claims based upon the alleged professional negligence of a health care provider.

The plain language of *Welfare and Institutions Code*, section 15657.2 specifically precludes any recovery pursuant to the elder abuse statutes for any cause of action brought against a health care provider for professional negligence. “Notwithstanding this article, any cause of action for injury or damage against a health care provider ... based on the health care provider’s alleged professional negligence, shall be governed by those laws which specifically apply to those professional negligence causes of action.” (*Welf. & Inst. Code*, § 15657.2) “In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence... [s]ection 15657.2 can therefore be read as making clear that the acts proscribed by section 15657 do not include acts of simple professional negligence, but refer to forms of abuse or neglect performed with some state of culpability greater than mere negligence.” (*Delaney v. Baker, supra*, 20 Cal.4th at 31-32, emphasis added.) Thus, by its very terms, EADACPA was not enacted to cover the professional negligence of health care providers. This is, of course, because such actions already are covered by well-developed legal principles governing medical malpractice actions and MICRA.

The Legislature's intent to create a clear demarcation between acts of elder abuse and medical negligence was first set forth by the California Supreme Court, which restated the statutory principle codified in *Welfare & Institutions Code*, section 15657.2 in clear and unambiguous language. In *Delaney v. Baker* (1999) 20 Cal.4th 23, the California Supreme Court stated that the question of whether “a health care provider which engages in the ‘reckless neglect’ of an elder... will be subject to ... heightened remedies, or if section 15657.2 forbids [such remedies] under these circumstances.” (*Id.* at 27.) The *Delaney* Court examined both the plain language of the statute and the legislature history of EADACPA, and determined that, by the statute's terms, there can be no claim for elder abuse unless a plaintiff can “demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence ... [s]ection 15657.2 can therefore be read as making clear that the acts proscribed by section 15657 do not include acts of simple professional negligence, but refers to forms of abuse or neglect performed with some state of culpability greater than mere negligence.” (*Id.* at 31-32, emphasis added.) The Court also cited directly to the legislative history of EADACPA, when it indicated that the “**Elder Abuse** Act's goal was to provide heightened remedies for ... ‘acts of egregious abuse’ against elder... adults...” (*Id.* at 35, emphasis added.) In the end, the *Delaney* Court held that “Section 15657.2 can... be read as making clear that the acts proscribed by [the Act] do not include acts of simple professional negligence, but refer to forms of abuse or neglect performed with some state of culpability greater than mere negligence.” (*Id.* at 32, emphasis added.)

The California Supreme Court once again addressed the issue of the distinction between medical negligence and abuse committed by a health care provider in *Covenant Care, Inc. v. Superior Court, supra*, 32 Cal.4th at 783, where the Court explained that “neglect refers not to the substandard performance of medical services but, rather, to the ‘failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations.’ ... Thus, the statutory definition of neglect speaks not of the *undertaking* of medical services, but of the failure to *provide* medical care....” (Emphasis original, citations omitted.)

Later in its decision, the *Covenant* Care Court emphasized again that:

“[E]lder abuse as defined in the Act, even when committed by a health care provider, is not an injury that is ‘directly related’ to the provider's professional services. That statutory elder abuse may include the egregious withholding of medical care for physical and mental health needs is not determinative. As a failure to fulfill custodial duties owed by a custodian who happens also to be a health care provider, such abuse is at most incidentally related to the provider's professional health care services.

That is, claims under the **Elder Abuse** Act are not brought against health care providers in their capacity as providers but, rather, against custodians and caregivers that abuse elders and who may or may not, incidentally, also be health care providers. Statutorily, as well as in common parlance, the function of a health care provider is distinct from that of an elder custodian, and ‘the fact that some health care institutions, such as nursing homes, perform custodial functions and provide professional medical care’... does not mean that the two functions are the same.” (*Id.* at 786, emphasis original, citations omitted; see also, *Country Villa Claremont Healthcare Center, Inc. v. Superior Court* (2004) 120 Cal.App.4th 426 [“**Elder abuse** claims are based on custodial neglect rather than professional negligence.”].)

Here, Erika Richardson was an in patient in a hospital, and she is not alleging that care was withheld. She is claiming that the allegedly substandard medical care allowed her to develop skin breakdown, and that the medical decision making regarding the use of restraints and her discharge was not appropriate, and that therefore, the care provided was inadequate. It is undisputed that the failure to provide appropriate care can be medical negligence, so the question before this Court is where to draw the line between a negligent failure to provide care and neglect which constitutes dependent adult abuse.

“[W]hen a cause of action is asserted against a health care provider on a legal theory other than medical malpractice, the courts must determine whether it is nevertheless based on the ‘professional negligence’ of the health care provider so as to trigger MICRA. The answer is sometimes yes and sometimes no, depending on the particular cause of action and the particular MICRA provision at issue.” (*Smith v. Ben Bennett, Inc.* (2005) 133 Cal.App.4th 1507, 1514.) The *Smith* Court went on to hold that **dependent adult abuse and medical negligence are mutually exclusive. Conduct can be one or the other but not both.** “*Delaney* makes clear that a cause of action for custodial elder abuse against a health care provider is a separate and distinct cause of action from one for professional negligence...” (*Id.* at 1518-1519.) Therefore, this Court should sustain the demurrer without leave to amend.

In *Benun v. Superior Court* (2004) 123 Cal.App.4th 113, the Second Appellate District Court of Appeal attempted to further clarify the distinction between negligence and neglect. The *Benun* Court clarified that **a medical provider treating a patient in their capacity as a medical provider, and providing services which require a license is not providing custodial care.** “[Professional negligence is a ‘negligent act or omission to act by a health care provider in the rendering of professional services ... provided that such services are within the scope of services for which the provider is licensed ... (*Id.* at 120, citing *Delaney v. Baker*.) The statutory definition of neglect includes a negligent act or omission in the rendering of non-professional, or custodial services. (*Welf. & Inst. Code, § 15610.57(b)(2)*.) In other words, services which anyone can do and which do not require a license. *Business & Professions Code*, section 2051 defines acts for which a medical license is required as the use of “drugs or devices in or upon human beings and to sever or penetrate the tissues of human beings and to use any and all other methods in the treatment of diseases, injuries, deformities, and other physical and mental conditions.” *Welfare & Institutions Code*, section 15610.17 defines a care custodian in pertinent part as “persons providing care or services for elders or dependent adults.” However, that definition does not include **medical** services, which are defined in *California Code of Regulations, Title 22, Division 5, section 70201* as “those preventive, diagnostic and therapeutic measures performed by or at the request of members of the organized medical staff.” Put another way, health care is “any care, treatment or service, or procedure to maintain, diagnose, or otherwise affect a patient's physical or mental condition.” (*Prob. Code, § 4615*.)

“Neglect within the meaning of the **Elder Abuse** Act ‘does not refer to the performance of medical services in a manner inferior to’ ‘the knowledge, skill and care ordinarily possessed and employed by members of the profession in good standing’... but rather to the failure of those responsible for attending to the basic needs and comforts of the **elderly** or dependent adults, regardless of their professional standing, to carry out their custodial obligations.” (*Benun v. Superior Court, supra*, 123 Cal.App.4th at 123, citing *Delaney v. Baker*.) “Statutorily, as well as in common parlance, the function of a health care provider is distinct from that of an **elder** custodian.” (*Id.* at 125, citing *Delaney v. Baker*.) According to *Benun*, “[t]he **Elder Abuse** Act's goal was to provide heightened remedies for ‘acts of **egregious abuse**’ against **elder** and dependent adults...” (*Id.* at 123, emphasis added.) “It follows that **egregious** acts of **elder abuse** are not governed by laws applicable to negligence.” (*Id.* at 124.) “The sponsor [of the **elder abuse** legislation] urged that existing limitations on damages and attorney fees should not apply in such **extreme cases** [referring to **elder abuse**].” (*Id.* at 123, emphasis added.) **Elder abuse** is “[m]ore than inadvertence, incompetence, unskillfulness, or a failure to take precautions” but “a conscious choice of a course of action...” (*Id.* at 123; see also, *Smith v. Ben Bennett, Inc., supra*, 133 Cal.App.4th at 1522 [“the legislative history of the **Elder Abuse** Act, as discussed in *Delaney*, indicates that it was intended to apply to acts of egregious **abuse**, while leaving acts of professional negligence not involving such egregious **abuse** to be dealt with under other law.”].) That is simply not plead in the Complaint. The management of a patient's skin breakdown, the use of medical restraints, and the decision to discharge a patient are **medical** care and **medical** decisions, which require a licensed health care practitioner.

As this Court is well aware from the Complaint itself, defendant was providing in patient medical care to Ms. Richardson. Therefore, any act or omission which occurred in the context of the provision of **medical** or **nursing care** to her was **negligence** and not **neglect**. Plaintiffs have failed to adequately plead this element of dependent adult **abuse**, presumably because they cannot. If this Court were to find that in every case where a plaintiff alleges that he did not receive appropriate care there is **abuse**, the distinction between **abuse** and medical malpractice made by the Legislature in *Welfare & Institutions Code*, section 15657.2, and by the Supreme Court in *Delaney v. Baker* (1999) 20 Cal.4th 23 would be meaningless.

Although the California State Legislature, the California Supreme Court, and the Second and Fourth Appellate District Courts of Appeal have made it quite clear that mere medical negligence, such as that plead here, does not support a dependent adult **abuse** claim, plaintiffs have nonetheless attempted to avail themselves of the enhanced remedies under EADACPA. These allegations are the textbook definition of **medical malpractice**, but do not state a cause of action for **dependent abuse**. There is no evidence whatsoever that Centinela Hospital was in a custodial relationship with Ms. Richardson, or that it took on any custodial (non-medical) functions with respect to her. (Although plaintiffs do cursorily allege that defendants were entrusted with Ms. Richardson's "custodial care," there is no fact pled to support that baseless claim, and in fact the allegations plead support its converse – that defendants' duty to this patient was to provide her with an appropriate level of **medical** and not **custodial** care.) Where, as here, plaintiffs' allegations center around the manner in which medical care was provided by licensed hospitals, physicians and nurses, there is no claim for dependent adult **abuse**. Therefore, defendant's demurrer to the first cause of action should be sustained without leave to amend.

III. THE FIRST AMENDED COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR INTENTIONAL INFILCTION OF EMOTIONAL DISTRESS

A. ERIKA RICHARDSON'S CLAIM

Just as with the dependent adult **abuse** cause of action, defendant argued in the original demurrer that this claim was inadequately plead, and the Court agreed. (See Exhibit E to Request for Judicial Notice.) Unfortunately for plaintiffs, the First Amended Complaint has failed to cure these pleading defects.

Where a plaintiff has suffered from physical injury, the cause of action is properly brought for negligence, not for emotional distress damages. (*Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916 [by definition a plaintiff cannot recover for negligent infliction of emotional distress if there is a claimed physical injury.] Here, Ms. Richardson claims to have suffered physical injuries as a result of Centinela Hospital's alleged negligence and **abuse**. Therefore, to permit her a separate recovery for emotional distress arising from those same facts would improperly allow a double recovery.

As set forth above, this cause of action is also inadequately plead. In order to state a cause of action for intentional infliction of emotional distress, plaintiffs must allege (1) an act of extreme and outrageous conduct by defendants that transcends all bounds of decency tolerated by society; (2) an intent to cause emotional distress; and (3) that the act caused severe emotional distress, consisting of fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation and indignity, or physical pain. (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 497-499.)

Here, plaintiffs allege that Centinela Hospital provided substandard medical care to Ms. Richardson in the hospital, inappropriately discharged her, and then made false statements regarding her mother, which somehow caused emotional distress to her. (FAC, ¶¶ 89-95.) While these allegations, if true, may have caused emotional distress to Ms. Richardson, they simply do not rise to the level required to state a cause of action for intentional infliction of emotional distress. Intentional infliction of emotional distress requires conduct which is especially calculated to cause and which causes severe mental distress. (*Coon v. Joseph* (1987) 192 Cal.App.3d 1269, 1273), or which is "so extreme as to exceed all bounds that are usually tolerated in a civilized community." (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.) Plaintiffs have not alleged any extreme or outrageous behavior that exceeds the bounds of a civilized community, they have merely restated their causes of action for negligence.

Plaintiffs have also failed to meet the most basic pleading requirement for a cause of action for intentional infliction of emotional distress -- they fail to sufficiently allege that any conduct by defendants was done with the specific intent to cause Ms. Richardson emotional distress. These allegations are simply insufficient to state a cause of action. Therefore, the demurrer to this cause of action should be sustained without leave to amend.

B. JACQUELINE KIRBY'S CLAIM

Ms. Kirby is advancing the same allegations in support of her intentional infliction of emotional distress cause of action as her daughter – that the substandard medical care provided to her daughter, the manner in which she was discharged, and the supposedly false statements made about her subsequently, caused emotional distress to her. (FAC, ¶¶ 135-138.) Therefore, defendant is immune from liability under this theory, pursuant to the authority cited *infra* in connection with the defamation cause of action.

In addition, just as with Ms. Richardson's cause of action, plaintiffs have failed to cure the pleading defects noted by the Court at the time of the original demurrer. (See Exhibit E to Request for Judicial Notice.) They still fail to meet the pleading requirements for a cause of action for intentional infliction of emotional distress. They have failed to plead an act of extreme and outrageous conduct by Centinela Hospital that transcends all bounds of decency tolerated by society, and they have failed to demonstrate in the First Amended Complaint that the aforementioned acts were done with a specific intent to cause Ms. Kirby emotional distress. Therefore, the demurrer to Ms. Kirby's cause of action for intentional infliction of emotional distress should also be sustained without leave to amend.

IV. THE FIRST AMENDED COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR DEFAMATION

In its ruling on the demurrer previously filed by defendant Centinela Hospital, this Court was clear that plaintiffs had failed to adequately state a cause of action for defamation, and had failed to demonstrate why the defendants would not be immune from liability, pursuant to *Penal Code*, section 11160, *Welfare & Institutions Code*, section 15634, and *Civil Code*, section 47. (See Exhibit E to Request for Judicial Notice.) Notwithstanding the Court's prior ruling, the First Amended Complaint contains no additional facts which would demonstrate why Centinela Hospital is not immune from liability for reporting suspected abuse. Therefore, the demurrer must be sustained without leave to amend.

Plaintiff Jacqueline Kirby is attempting to state a cause of action for defamation against the defendants for allegedly reporting her to Los Angeles County Adult Protective Services and to the Westside Regional Center for suspected abuse of her daughter. (FAC, ¶ 122.) She also alleges that these statements were reiterated in a Court action involving her daughter's custody. (FAC, ¶ 122.) Unfortunately for Ms. Kirby, these claims fail to meet the pleading requirements for a cause of action for defamation.

Defamation “involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage.” (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645.) In order to adequately plead a claim for defamation, the First Amended Complaint must include a specific identification of the words used, it must identify which defendant made the defamatory comments, and it must allege when, where or how those statements were made public. (See generally, *Okun v. Superior Court* (1981) 29 Cal.3d 442.) These allegations are still missing from the First Amended Complaint; therefore, the demurrer should be sustained without leave to amend.

Centinela Hospital is immune from liability in relation to the alleged defamatory statements, which are subject to an absolute privilege, pursuant to both *Penal Code*, section 11160 and *Welfare & Institutions Code*, section 15634. As set forth above, there is no information in the First Amended Complaint to the contrary.

Penal Code, section 11160(a)(2) provides that a health care provider “shall immediately make a report” of “[a]ny person suffering from any wound or other physical injury inflicted upon the person where the injury is the result of... **abusive** conduct.” *Penal Code*, section 11161.8 further provides that “[n]o person shall incur any civil or criminal liability as a result of making any report authorized by this section.” That is reiterated in *Penal Code*, section 11161.9, which provides that “[a] health practitioner who makes a report in accordance with this article shall not incur civil or criminal liability as a result of any report required or authorized by this article.” **This immunity is absolute.** (*Storch v. Silverman* (1986) Cal.App.3d 671,675 [discussing mandatory reporting of suspected child **abuse**].)

Similarly, *Welfare & Institutions Code*, section 15634 states in relevant part that “[n]o care custodian, clergy member, health practitioner, mandated reporter of suspected financial **abuse** of an **elder** or dependent adult, or employee of an adult protective services agency or a local law enforcement agency who reports a known or suspected instance of **abuse** of an **elder** or dependent adult shall be civilly or criminally liable for any report required or authorized by this article.” **Just as with the corresponding Penal Code sections, this immunity is absolute.** (*Easton v. Sutter Coast Hospital* (2000) 80 Cal.App.4th 485, 491.)

The alleged defamatory statements are also privileged, pursuant to *Civil Code*, section 47, which provides that communications with an interested party are subject to a qualified privilege, provided they were made without malice. In this case, there are insufficient facts plead to demonstrate malice. Moreover, based on the plain language of the First Amended Complaint, the allegedly defamatory statements were made between the hospital and the Regional Center and/or Adult Protective Services. Therefore, these statements were made by and between health care providers, nurses, social workers and administrators who had a specific obligation to care for Ms. Richardson, and were not made to the general public. Clearly, these people were interested parties, as defined by the relevant case law. (*Rancho La Costa, Inc. v. Superior Court* (1980) 106 Cal.App.3d 646, 664-665; *Institute of Athletic Motivation v. University of Illinois* (1980) 114 Cal.App.3d 1, 10.)

Lastly, the First Amended Complaint alleges that the defamatory statements were made in court proceedings. Therefore, they were absolutely protected by the litigation privilege. (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212; *Rubin v. Green* (1993) 4 Cal.4th 1187, 1193.) This privilege is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards. (5 *Witkin, Summary of Cal. Law, Torts*, §§ 470, 505, pp. 554, 591; *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057.) Based on the foregoing immunities, Centinela Hospital's demurrer to this case of action should be sustained without leave to amend.

V. THE CAUSE OF ACTION FOR DEFAMATION IS TIME-BARRED

The applicable statute of limitations for defamation is set forth in *Code of Civil Procedure*, section 340(c), which provides that a claim for libel or slander must be brought within one year of the act. In this case, plaintiffs allege that the publication of the defamatory statements took place in April 2008, leading to Ms. Richardson's removal from Ms. Kirby's home at that time. (FAC, ¶ 122) Therefore, that was the date that the one year statute of limitations began to run. Since this action was not filed until *August 11, 2009*, more than one year from April 2008, plaintiffs' cause of action for defamation is barred by the applicable statute of limitations. Plaintiffs' cursory allegations regarding delayed discovery of the alleged defamation are insufficient to justify the late filing. (*Dujardin v. Ventura County General Hospital* (1977) 69 Cal.App.3d 350, 356.) Therefore, the demurrer to this cause of action should be sustained without leave to amend.

VI. THE FIRST AMENDED COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR NEGLIGENT INFILCTION OF EMOTIONAL DISTRESS

Although the Court sustained the original demurrer with leave to amend, stating that plaintiff had failed to adequately plead the elements of a bystander claim for negligent infliction of emotional distress, the First Amended Complaint remains defective. (See Exhibit E to Request for Judicial Notice.) In fact, Jacqueline Kirby still has not clarified whether she is seeking recovery for bystander negligent infliction of emotional distress or as a direct victim.

She appears to be seeking bystander recovery for emotional distress, but she has still failed to adequately plead this cause of action. Bystander negligent infliction of emotional distress is subject to strict criteria:

“[A] plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person if, but only if, said plaintiff: (1) is closely related to the injury victim; (2) is present at the scene of the injury-producing event at the time it occurs and is aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress -- a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances. (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 667-668.)

In *Bird v. Saenz* (2002) 28 Cal.4th 910, the Supreme Court clarified the holding in *Thing* that in order to recover for negligent infliction of emotional distress, the claimant must be **contemporaneously aware** of a causal connection between the **negligent** conduct and the resulting injury. (*Bird v. Saenz, supra*, 28 Cal.4th at 918-919.)

Here, Ms. Kirby has alleged that she was present to receive her daughter at her home, but the injury had already occurred, based on her description of Ms. Richardson's condition on arrival at home. This is not sufficient to meet the *Thing* criteria. (FAC, ¶ 129.) Moreover, she has not alleged that she suffered any emotional distress which constituted an abnormal response to the circumstances. Lastly, she has failed to allege that she was contemporaneously aware of the alleged negligence at the time it occurred, and that it was causing injury to her daughter. Therefore, she may not recover damages for bystander emotional distress.

Ms. Kirby also cannot sustain a direct victim claim, as she was not the patient against whom the alleged conduct was directed. (*Huggins v. Longs Drug Stores California, Inc.* (1993) 6 Cal.4th 124. The hospital's actions as pled by plaintiffs were not intended to affect Ms. Kirby, and no duty was breached as to her. Therefore, the demurrer to this cause of action must be sustained without leave to amend.

VII. PLAINTIFFS' FIRST AMENDED COMPLAINT FAILS TO ALLEGE FACTS SUFFICIENT TO STATE A CAUSE OF ACTION FOR WILLFUL MISCONDUCT²

As a preliminary matter, in *Berkley v. Dowds*, (2007) 152 Cal. App.4th 518, the Court of Appeal for the Second Appellate District, Division Four held that there is no tort for willful misconduct recognized in California. “It is not a separate tort, but simply ‘an aggravated form of negligence, differing in quality rather than degree from ordinary lack of care.’” (*Id. at 526.*) Even assuming that such a cause of action exists, the pleading requirements for this tort require greater specificity than is required for claims of ordinary negligence. (*Snider v. Whitson* (1960) 184 Cal. App. 2d 211, 214 [complaint lacked sufficient specificity to establish claim for willful misconduct]; *Charpentier v. Von Geldern* (1987) 191 Cal. App. 3d 101 [conclusory allegation that defendant engaged in willful or wanton misconduct is insufficient]; *Berkley v. Dowds, supra*, Cal. App. 4th at 528 [trial court properly sustained demurrer, without leave to amend, for lack of specificity in alleging **elder abuse** and willful misconduct claims].)

Even assuming *arguendo* that there is still a separate claim for willful misconduct in California, plaintiffs' allegations as to the seventh cause of action for willful misconduct are insufficient on their face to support a cause of action for willful misconduct. “Three essential elements must be present to raise a negligent act to the level of willful misconduct: (1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) conscious failure to act to avoid the peril.” (*Nazar v. Rodeffer* (1986) 184 Cal.App.3d 546, 552; see also *New v. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, 689 [willful misconduct is defined as “intentional wrongful conduct, done either with a knowledge that serious injury to another will probably result, or with a wanton and reckless disregard of the possible results.”])

Plaintiffs have failed to adequately plead an intent on the part of defendant to ignore or fail to address that particular peril. The mere fact that these events occurred is insufficient to establish this cause of action for willful misconduct. “To constitute ‘willful misconduct’ there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury.” (*Porter v. Hofman* (1938) 12 Cal.2d 445, 448.)

“Where a party relies on willful misconduct there are sound reasons why he should be required to state facts more fully than in ordinary negligence cases so that it may be determined whether they constitute willful misconduct rather than negligence or gross negligence.” (*Colich & Sons v. Pacific Bell* (1988) 198 Cal.App.3d 1225, 1241-1242.) Plaintiffs have failed to make the requisite showing in order to sustain a cause of action for willful misconduct. **“The mere failure to perform a statutory duty is not alone, willful misconduct. It amounts only to simple negligence.** To constitute ‘willful misconduct’ there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury.” (*Porter v. Hofman, supra*, 12 Cal.2d at 448, emphasis added.) Therefore, defendant's demurrer to this cause of action should be sustained without leave to amend.

VIII. PLAINTIFFS' FIRST AMENDED COMPLAINT FAILS TO ALLEGE FACTS SUFFICIENT TO STATE A CAUSE OF ACTION FOR FRAUD (NEGLIGENT MISREPRESENTATION)³ /

Negligent misrepresentation is a form of fraud or deceit. (*Civil Code*, section 1710(2).) Plaintiffs have failed to plead each and every element of fraud with particularity, and consequently have failed to state a cause of action as against Centinela Hospital. It is well settled that fraud actions are disfavored, and that the general rule of liberal construction of pleadings does not apply to fraud causes of action, which must be specifically pled. (*Scafidi v. Western Loan & Bldg. Co.* (1946) 72 Cal.App.2d 550, 558; 5 Witkin, *California Procedure* (4th Ed.) § 669.)

“[F]raud actions are subject to strict requirements of particularity in pleading. Every element of the cause of action for fraud must be alleged in the proper manner (i.e., factually and specifically) and the policy of liberal construction of the pleadings will not ordinarily be invoked to sustain a pleading defective in any material respect.” (*Nagy v. Nagy* (1989) 210 Cal.App.3d 1262, 1268; *Hall v. Dept. of Adoptions* (1975) 47 Cal.App.3d 898, 904.)

In order to state a cause of action for fraud, specific facts must be asserted to show how, when, where, to whom, and by what means the representations were tendered, from what date the falsity of defendants' intentions could be inferred, or how, when, where, to whom and in what circumstances plaintiffs became justified in relying upon these representations. (*Shapiro v. Wells Fargo Realty Advisors* (1984) 152 Cal.App.3d 467.) Since this case involves a corporate defendant, the pleading requirements for fraud are even stricter. It is well-settled that when a plaintiff seeks to charge a defendant corporation with fraud, it is “necessary for him to allege the name of the person who spoke, his authority to speak, to whom he spoke, what he said or wrote, and when it was said or written.” (*Mason v. Drug, Inc.* (1939) 31 Cal.App.2d 697, 703.)

Nowhere in this complaint have plaintiffs set forth in any way the representations made to them by defendants, the manner in which they were communicated to them, and by whom they were communicated or when. Therefore, plaintiffs have not alleged their fraud cause of action with sufficient particularity.

Further, plaintiffs have failed to establish each of the elements of negligent misrepresentation. The elements of negligent misrepresentation are “(1) a misrepresentation of a past or existing material fact, (2) without reasonable grounds for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) ignorance of the truth and justifiable reliance thereon by the party to whom the misrepresentation was directed, and (5) damages.” (*B.L.M. v. Sabo & Deitsch* (1997) 55 Cal.App.4th 823, 834, quoting *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 962.)

Here, plaintiffs fail to allege that any misrepresentation made to them were done without reasonable grounds for believing them to be true. As set forth above, where any element of a fraud cause of action is not present, that cause of action must be dismissed by the Court. (*Gagne v. Bertran* (1954) 43 Cal.2d 481, 487-488 [an assertion made without reasonable grounds for believing it to be true must be made in order to state a cause of action for negligent misrepresentation].)

Plaintiffs have also failed to establish the damages element of negligent misrepresentation. The First Amended Complaint alleges that the Hospital's alleged negligent misrepresentation injured the plaintiffs. It is well-settled that emotional distress damages are not available in a cause of action for negligent misrepresentation. "We restate that which we believe to be settled law, namely that damages for emotional distress are ordinarily not recoverable in an action for negligent misrepresentation when the injury other than the emotional distress is only economic." (*Branch v. Homefed Bank* (1992) 6 Cal.App.4th 793, 798.) Here, the bulk of the damages prayed for in plaintiffs' First Amended Complaint are for emotional distress. Since plaintiffs do not establish that they seek any other damage here, they may not advance a cause of action for negligent misrepresentation.

Lastly, Jacqueline Kirby lacks standing to advance this cause of action, because to the extent the statements were made to her, it was in her capacity to act on behalf of Erica Richardson. She has not plead that they were directed at her to induce her reliance or specific act as to her, or that she personally was damaged as a result.

Pursuant to all of the above-cited authority, plaintiffs' eighth cause of action for negligent misrepresentation is insufficiently pled, and therefore, the demurrer to this cause of action should be sustained without leave to amend.

IX. IT IS PROPER FOR THE COURT TO SUSTAIN A DEMURRER WITHOUT LEAVE TO AMEND AS TO REDUNDANT CAUSES OF ACTION

Plaintiffs' first, second, fourth, fifth, sixth, seventh, eighth and ninth causes of action are duplicative of the third cause of action for negligence. It is well settled that claims which merely duplicate other claims in a pleading are subject to demurrer. (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 14.) Further, a demurrer is properly sustained **without** leave to amend as to a cause of action which adds nothing to a Complaint by way of fact or theory of recovery. (*Rodrigues v. Campbell Industries* (1978) 87 Cal.App.3d 494, 501.) This Court should sustain defendant's demurrer to these redundant causes of action, because they are simply duplicative of the facts and basis of liability of the third cause of action for negligence. (See, *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197,222 [breach of fiduciary duty cause of action are unnecessary given other causes of action, affirming orders sustaining demurrer without leave to amend].) Accordingly, defendants' demurrer to the aforementioned causes of action should be sustained without leave to amend.

CONCLUSION

For all of the foregoing reasons, defendant Prime Healthcare Centinela LLC dba Centinela Hospital Medical Center respectfully request that its demurrer to plaintiffs' First Amended Complaint be sustained without leave to amend.

DATED: April 22, 2010

CARROLL, KELLY, TROTTER, FRANZEN & McKENNA

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Footnotes

- ¹ Indeed, the Legislature enacted MICRA years earlier in an effort “to contain the costs of [medical] malpractice insurance by controlling or redistributing liability for damages, thereby maximizing the availability of medical services to meet the state's health care needs.” (*Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 112.)
- ² This cause of action was added to the First Amended Complaint without leave of Court, and is subject to being stricken, pursuant to the accompanying Motion to Strike.
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